Filed 2/25/05 In re Mia L. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re MIA L., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. DONIELA B., Defendant and Appellant.	F046356 (Super. Ct. No. JD101215) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Jennifer E. Zahry, Deputy County Counsel, for Plaintiff and Respondent.

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[*] Before Vartabedian, Acting P.J., Harris, J., and Buckley, J.

Doniela B. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her daughter, Mia L.[1] Appellant contends the court erred by denying her eleventh-hour, section 388 petition to reopen reunification efforts. On review, we disagree and will affirm.

PROCEDURAL AND FACTUAL HISTORY

In September 2003, the Kern County Superior Court adjudged four-month-old Mia a dependent child of the court, removed her from parental custody and ordered reunification services for appellant as well as the child's father. The infant came within the court's dependency jurisdiction under section 300, subdivision (b) due to her parents' problems with drug use and domestic violence. Although the parents were initially cooperative with respondent Kern County Department of Human Services (the department) and appeared committed to reunification efforts, they in fact made little effort to reunify. At best, appellant visited consistently with her child. However, appellant frequently failed to submit to random drug testing and did not pursue court-ordered parenting classes, substance abuse treatment, and domestic violence counseling. Consequently, in March 2004, the court terminated reunification efforts and set a section 366.26 hearing to select and implement a permanent plan for Mia.

Then, in mid-June, each parent filed a section 388 petition seeking to set aside the order terminating reunification services and enter a new order for family maintenance or reunification services. The parents relied on the fact that the court, in a dependency proceeding recently initiated after the birth of their second child, found the parents made subsequent efforts and granted them reunification services. The parties each alleged as well that they were consistently testing negative for drugs, had completed parenting and neglect classes, and was actively participating in domestic violence and substance abuse

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

counseling. The court granted a hearing on the petitions to be conducted on the same date as the permanency planning hearing.

In anticipation of the permanency planning hearing, the department prepared a social study recommending the court find the child adoptable and terminate parental rights. The child's foster parents, with whom she had been placed upon her initial detention, were committed to adopting her. The social study as well as three subsequent supplemental reports also addressed the parents' section 388 petitions.

Overall, the department discovered that the parents actively participated in parenting classes, domestic violence and anger management sessions, drug counseling, and drug testing through the month of April. Indeed, the parents did complete parent effectiveness training as of early May 2004. They also attended domestic violence and anger management sessions, scheduled to last for six months, in April and May. However, there was no evidence of subsequent participation. In addition, the department's investigation revealed the parents last submitted to drug testing in mid-May and subsequently missed, at least in appellant's case, five opportunities to test. As for drug counseling, their facilitator had advised them in March that they would need to seek other counseling because the facilitator was no longer on an approved list. As of July, however, the parents had not yet resumed drug counseling.

At the July hearing on the parents' petitions and the department's recommendation to terminate parental rights, appellant's counsel made the following offer of proof. If his client were called to testify, she would state:

> "that prior to two to three weeks ago [roughly the beginning of July], she had been regularly attending counseling with Mr. Brooks [her drug counseling facilitator] and with Charlie Erdman (phonetic) at the Alliance Against Family Violence; that she has not attended either of those counseling [*sic*] for approximately two to three weeks though. She hasn't attended that counseling because of a loss of focus related to some problems with the father. She would testify that she has missed some recent drug tests and yet she maintains that she has been clean for a

significant period of time even though she has been missing those drug tests."

The court accepted counsel's offer of proof before hearing argument. Thereafter, the court denied the section 388 petitions, and having found the child adoptable, terminated parental rights.

DISCUSSION

Appellant argues the court abused its discretion by denying her section 388 petition. We disagree. A parent may petition the court for such a modification on grounds of change of circumstance or new evidence. (§ 388, subd. (a).[2]) The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (b); Cal. Rules of Court, rule 1432(c).)

Whether the juvenile court should modify a prior order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of

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[2] Section 388 provides in pertinent part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶]

"(c) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes."

discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Ibid.*)

No doubt appellant in her formal section 388 petition made a prima facie showing of changed circumstances, thereby entitling her to a hearing on her request for family maintenance or reunification services. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) In contrast to her prior inaction upon which the court based its March 2004 order terminating reunification services, appellant allegedly was consistently testing negative for drugs, had completed parenting and neglect classes, and was actively participating in domestic violence and substance abuse counseling.

However, evidence subsequently introduced by the department as well as by appellant undermined her section 388 allegations such that the court properly could conclude appellant's circumstances in fact had not significantly changed. At best, she completed parent effectiveness training. On the other hand, she had not drug tested since mid-May although the testing group of which she was a part of had been called subsequently on five occasions. Also, in response to a social worker's personal request to test in July, appellant claimed she could not provide a sample. Similarly, a check with appellant's counseling facilitator revealed appellant had not attended substance abuse counseling since the end of April and domestic violence counseling since the end of May 2004. Even by appellant's own admission, she had lost her focus as a result of some problems she allegedly had with the child's father. Thus, appellant continued to demonstrate her inability to participate regularly and make substantive progress in court-ordered treatment problems as well as the fact there was no substantial probability that the child might be returned to her within another six months. (See § 366.21, subd. (e).)

Even were we to assume appellant did sufficiently show changed circumstances, we nevertheless would conclude the juvenile court, in a proper exercise of discretion,

could find appellant failed to show additional reunification efforts at this juncture would promote Destiny's best interests. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) To understand the element of best interests in the context of section 388 motion brought, as in this case, on the figurative eve of a section 366.26 hearing, we look to the supreme court's decision in *In re Stephanie M., supra.* At this point, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, the focus shifts to the needs of the child for permanency and stability and the court's evaluation of the child's best interests. (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.)

In this case, simply put, appellant's evidence did not establish that the child's need for permanency and stability would be advanced by an order for renewed services, whether they be reunification or family maintenance. Appellant, however, overlooks this imperative and instead relies on the department's evidence that she had maintained regular and loving visits with Mia throughout the child's dependency.

She also urges this court to apply factors legislated by the appellate court in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532, to evaluate the children's best interests. Those factors which the appellate court created are: the seriousness of the problem leading to dependency and the reason that problem was not overcome; the strength of relative bonds between the dependent children to both parent and caretakers; and the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (*Ibid.*)

We decline to apply the *Kimberly F.* factors if for no other reason than they do not take into account the Supreme Court's best interests analysis in *Stephanie M.* At most, the *Kimberly F.* court reviewed the facts in *Stephanie M.* and compared them with the underlying facts in their case. (*In re Kimberly F., supra,* 56 Cal.App.4th at pp. 533-534.) However, even were we to follow the *Kimberly F.* factors, we would affirm the court's denial of appellant's section 388 petition on this record.

DISPOSITION

The order terminating parental rights is affirmed.